

LEX REX AND ITS AUTHOR

BY THE REV. WILLIAM M. CAMPBELL, B.D., Ph.D.

I

THE author of *Lex Rex* was Samuel Rutherford (1600-1660), formerly minister of Anwoth and Professor of Divinity in the University of St. Andrews. An account of his life cannot be attempted here, but his name is familiar because of the famous *Letters*, mostly written from his exile in Aberdeen. Yet the vogue of the *Letters* was largely posthumous, and it was to his works of theological learning that he owed his contemporary fame. These were many and varied. They include Latin treatises on Calvinist theology which drew for him invitations to chairs in Dutch Universities. Works on Church History and Church Government flow from his pen. He is the most voluminous and learned of all the Presbyterian apologists, the most fervent of their propagandists. He is perhaps at his best in the sermon and in his works of experiential theology. These may be neglected now, but to read them is to become acquainted with an intensely devout and Christian soul. By one of the paradoxes with which the life of this man is so filled, he wrote the best book from a Scottish pen against religious toleration and the best book in defence of civil liberty. The latter was the *Lex Rex*. Rutherford wrote most of the work when in London as a Scots Commissioner at the Westminster Assembly of Divines, but from the remarkable learning shown, it is clear that he had studied the subject long before Maxwell's defence of the Divine Right drew forth *Lex Rex* in answer. Not his signing of the Covenant, nor his works of Ecclesiastical controversy, nor his adherence to the Protester party, nor even his sermons before Charles II were what brought his head nigh the scaffold—a fate from which death saved him—but the damning authorship of *Lex Rex* which was burned by the hangman as soon as Charles came to power. Even in Church affairs Rutherford was the most democratic of his contemporaries, and he remained faithful to the principles of *Lex Rex* when all his former friends deserted them. He would gladly have died for them.

II

Lex Rex was published anonymously in London in 1644, "By Authority." Rutherford's authorship never seems to have been questioned

and whether or not he wrote it ; in 1661 he would have been hanged for it. Row, in his *Life of Blair*, gives an account of its production. He tells us that when Rutherford had written a part of *Lex Rex* he submitted it to Blair for criticism. Blair dissuaded him from publishing it on the ground that such a subject was fit only for jurisconsults and lawyers. He accepted Blair's advice for a time. " But shortly thereafter, being at London, one of our Commissioners to the Assembly of Divines, Lord Wariston, did again yoke him to that work and (as was thought) did not only assist but did wholly complete and finish that work, anno 1645."¹

An interesting fact is to be gathered from Row's statement. As Maxwell's book, *Sacro-sancta Regum Majestas*, to which *Lex Rex* was a reply, was published after Rutherford came to London, it follows that some of Rutherford's work must have been written before it appeared, with some different objective. Internal evidence supports this conjecture. Questions 28-37 deal with the " Lawfulness of Defensive Wars " and with the practical case of the Scots taking up arms against Charles. The writers controverted in this portion are Ferne, Arnisaeus and Barclay. There are only two references to Maxwell. The first of these appears half way through Chapter 29, and comprises from the middle of it to the end ; the next occurs in Chapter 33 from the middle to the end. The argument of these insertions (for they are obviously appended loosely to earlier materials) is supplementary to the preceding thought of these chapters. In this portion (Question 28-37) Barclay and his party are referred to as " Royalists "—Royalists say, Royalists aver &— . In other parts of the *Lex Rex* the reference is to the " Popish Prelate " and his assertions are interwoven, interspersed and refuted throughout. It therefore appears that Rutherford, before going to England and on the occasion of the Covenant, had taken up his pen in justification of the Scots waging a " defensive war." This treatise is embodied in the portion of *Lex Rex* specified. He probably laid aside this work, acting on Blair's counsel. The colossal learning shown in the whole treatise could also hardly have been acquired in the few months between the publication of Maxwell's treatise and that of *Lex Rex*.

The date of the nucleus on " Defensive Wars " is further fixed by two things. The whole ten chapters of it resound with fury at the " bloody Irish." It is obviously written after Argyll's publication of the Earl of Antrim's papers which had revealed Charles's secret dealings with the Irish (late May, 1643). Even direct reference to this occurs. " The King hath now made a cessation with the bloody Irish."² All references to the Cessation deal with proposed landings of Irish which suggests that the

¹ Row, *Life of Blair*, p. 346.

² *Lex Rex*, 165. The citations throughout are from the 1843 edition.

treatise was written while negotiations were going on. The whole pamphlet was in support of Argyll's policy, and is further dated by the fact that it begins by defending him indirectly against the charge of wishing to depose Charles. Montrose at this time was becoming loud in such charges. The facts therefore point to the summer of 1643 for the penning of the tractate on "Defensive Wars." It was probably written during the negotiation of the "Solemn League and Covenant," but perhaps before it was signed; at least the reference to treaties with England given in its last Chapter makes no mention of the "Solemn League." The purpose of the pamphlet was to strengthen the desire in the people for a defensive alliance with the English Parliament against Charles. (As these chapters of *Lex Rex* form a separate entity, I propose to deal with them as such and shall entitle this nucleus "Defensive Wars.") In the "Defensive Wars" Rutherford deals with an immediate practical issue. He has to justify on defensive grounds what may militarily be an offensive war. He finds it difficult to distinguish between the defensive and the offensive war, so finally concludes that as far as the Scots were concerned their intention is defensive, though their military action may be offensive. To such an action many were lukewarm and not a few were hostile.¹ To convert the former and confute the latter was the object of the pamphlet.

III

It is an incendiary piece of fireworks, teeming with fury, filled with a venomous antipathy towards the "bloody Irish and barbarous cutthroats," ridiculing with a savage irony Charles's prerogative, his promises and his prudence. Small wonder it is that his son sought the author's head. Fear of an Irish invasion (many of his friends had suffered cruelly in the Ulster Rising) weighed cogently with Rutherford as a reason for resistance to Charles and an alliance with England. Charles' treating with the Irish is subjected to constant vituperation; "No second Ulster here" is the burden of his outcry. The tragic fate of Montrose's Irish troops showed that his countrymen shared Rutherford's opinion of them. The King's prerogative is an accursed thing. "The man who is King may command an idolatrous and superstitious worship, send an army of cutthroats against them because they refuse that worship—may imprison, deprive, confine, cut the ears and slit the noses, and burn the faces of those who speak and preach the truth of God; the man I say in these acts is a terror to good works—an encouragement to evil."² The King's promises are ironically mocked. "He hath a piercing faith in miracles,

¹ Robt. Baillie's Letters, II, 102.

² *Lex Rex*, 145.

who believeth that armed Papists shall defend the religion of Protestants.”¹ “His coming with armed men into the House of Commons to demand the five members is very symbolical. His coming to Hull with an army saith not he had no errand there, but to ask what it was in the clock.”² Of the Royal prudence and wisdom Rutherford has little appreciation. Charles is “a King overawed by bloody Papists” and “forced to command an unjust war.”³

The preacher in Rutherford regarded the war primarily as a crusade though he spends nine of ten chapters vindicating it as a defensive war. Strangely enough he dismisses as unworthy one of the strongest practical arguments for his case, namely, that Charles having conquered England would undoubtedly turn on Scotland, and should be resisted now. His chief argument is this. It is my Christian duty to help my neighbour when he is fallen into sore straits through misfortune or through his own sins. Most certainly I am to help if I am asked, even if I am not asked, nay even if he refuses my help; for he says, “if a neighbour nation be jealous of our help and in a hostile way should oppose our helping (which, blessed be the Lord, the honourable houses of the Parliament of England hath not done), though malignant spirits tempted them to such a course, what, in that case, we should owe to the afflicted members of Christ’s body, is a case may be determined easily.”⁴ It is the argument of a Crusader. For him the answer was Crusade and invade. The war was doubly blessed, for England being rescued not only from tyranny, but also from the damnation of Episcopacy, would be brought to the salvation of the Presbyterian faith.

He insists, however, that the war being waged is a defensive war since both Scots and English are resisting a King, who, if not a tyrant, has certainly committed acts of tyranny. With the exception of those dealing with the immediate issue, all the arguments legal, moral and Scriptural which Rutherford uses in “Defensive Wars” are those which had already been used and abused in the controversial pamphlets of the Bishops’ War. The best summary of these is John Corbet’s *Ungirding of the Scottish Armour*, which is an answer to “the Information for Defensive Arms” drawn up by the Covenanters in 1639, and embodies it in a word-for-word reply. Rutherford’s work is a more impassioned, but also more scholarly, treatment of all this former apologetic for defence.

Briefly, he deems Charles may be resisted in the present case because he has acted as a tyrant, impelled thereto by bad advice. He has broken his coronation oath to defend the Protestant religion and govern peaceably in its interests. He has acted unconstitutionally in raising an army and declaring war without consent of Parliament. In this the Scot is at one

¹ *Lex Rex*, 165.

³ *Lex Rex*, 140.

² *Lex Rex*, 165.

⁴ *Lex Rex*, 188.

with the English common lawyer in the interpretation of their respective constitutions. But there is an interesting difference. Rutherford would not have admitted Ship-Money as a cause for armed resistance. He writes, "I would not think it fit easily to resist the King's unjust exactors of customs or tribute. . . . It is better to yield in a matter of goods than to come to arms, for of sinless evils we may choose the least."¹ This may be typical, for Scotland had no John Ball, Jack Cade or Wat Tyler.

His more general juristic argument for defensive war is as follows. Danger to a people's life and religion is alone considered ground for resistance. Charles by his actions had put both in jeopardy. Self defence is a natural law which a people must obey. (It will be seen later that he makes a great use of the distinctions of Aquinas—or rather of his pupils—*Lex Naturalis*, the law of nature; *Jus gentium*, the law of nations; *Jus positivum* or *civile*, positive law, or the law of a Kingdom, in expounding his theories. Here also he uses them. The right of resistance as already shown is defended because Charles has broken some of the positive laws of his Kingdom.) Of self defence he writes, "It were a mighty defect in Providence to man if dogs by nature may defend themselves against wolves, bulls against lions—if man, in the absence of the lawful magistrate, may not defend himself against unjust violence."² The Christian action under danger to life and religion should be to try supplication next to essay flight, finally to resist to the death. Scotland had tried the first; the second was impossible; the third only was left. Withal in the case of sudden inroad, the third only may be possible. "If the King send an Irish rebel to cast me over the bridge and drown me in a water, I am to do nothing—but nature and the law of self defence warranteth me to horse him first over the bridge and then consult how to defend my self at my own leisure."³ Rutherford was not without humour. He sees also a Breach of the law of nations (*Jus Gentium*) in the Irish Treaty. In the *De Jure Belli et Pacis* Grotius had allowed resistance to a monarch who sold his Kingdom. The Irish Treaty was such an action on the part of Charles, and he points out that even royalist protagonists like Barclay, Ferne and Arnisaeus allow resistance in this case.

With regard to the civil or positive laws of a Kingdom it is stated that the people may resist either King or Parliament in acts which are contrary to these, presumably in acts against the life and liberty of a people or detrimental to the principles of Common Law. "Obedience is relative to a precept, and it is menservice to obey a law not because it be good and just, but upon this formal motive, because it is the will of a mortal man to command it."⁴ Thus, in war, "the subjects must look

¹ *Lex Rex*, 141.

² *Lex Rex*, 163.

³ *Lex Rex*, 165.

⁴ *Lex Rex*, 150.

to the cause of the war more than the authority of the King.”¹ This is the plea of the conscientious objector, yet Rutherford’s party in the Act of Classes had little sympathy for those who looked to the cause of the war rather than the authority of the Kirk.

The moral and Scriptural arguments of his case are those which were handled mercilessly by both sides in the pamphleteering of the Bishop’s War, indeed those which are still torn and tortured by the pacifist and his opponent. To Rutherford there is no virtue in suffering *per se*. Self flagellation is by no means the essence of sainthood. Absolute submission to evil men was commanded to Christ alone. “God hath not said to me in any moral law, ‘be thou killed, tortured, beheaded,’ but only ‘be thou patient, if God deliver thee to wicked men’s hands, to suffer these things.’”² Resistance must be offered to those who work evil, for evil is not God’s will. Flight is only a negative form of resistance. War is evil, but participation in a righteous war is not a sin.

Neither passive resistance nor violent resistance is incompatible with Scriptural teaching, but as he denies that man is ever commanded to suffer needlessly, he throws all the weight of his argument and exegesis against the doctrine of passive resistance as the sole Christian weapon against tyranny. David and Saul, Elijah and Ahab, Jeremiah as a non-resister, Uzziah and the priests, all the Scripture arguments for either side which had appeared in the pamphlets of the Bishop’s War are examined, used or discarded with an exegesis which is often just and penetrating, but sometimes casuistic. Here, and this is strange in a Seventeenth Century Divine, Rutherford does not depend chiefly on Scripture argument, or at least argument from Scripture practice. He writes, “Practice in Scripture is a narrow rule of faith.”³ Jeremiah’s counsels had little to do with the present case. His exegesis in the political is much freer than in the ecclesiastical tractate.

Corbet, in his *Ungirding of the Scottish Armour*, had claimed that the Covenanters could only depend on Old Testament argument, not on the New Testament. Without dealing with matters still controversial, it may be said that Rutherford attacks pacifism based on a narrowed New Testament ethic as violently as he supports the right of resistance from Old and New alike. He holds with the Calvinist of his age that Christ’s non-resistance was a special case, and that the general import of His teaching in this matter is aimed at forbidding revenge for injury and insult, not at preventing resistance to evil and evildoers. So also he interprets the teaching of Paul and Peter. The obedience to rulers commanded in Romans xiii he believes is only to those who are a terror to evil doers,

¹ *Lex Rex*, 187.

² *Lex Rex*, 141.

³ *Lex Rex*, 179.

and Charles was a terror to the good. The pacifist and non-resister shut their eyes to the present evil case. He cannot see why "Protestants in England and Scotland should remain in their houses unarmed while the Papists and Irish come to them armed, and cut their throats, and spoil and plunder at will"¹ any more than the majority of men in 1940 can see why the Germans should do the same. Non-resistance seemed the surest way of encouraging tyranny, forging bondage, and intensifying evil.

Dealing with the Fathers who support non-resistance, Rutherford's main retort is that they are men and fallible (Tertullian was a heretic.) He balances their authority with that of the reformed teachers—Calvin, Beza and Buchanan—who support his cause. He is hardly accurate in this, and noticeably gives no verbal citations, for early reformed tradition had leant to passive resistance, even in Calvin, though he qualifies obedience to the King by "as far as God's law will permit."

In the "Defensive Wars" Rutherford shows himself a zealous partisan of Argyll. He is a Scotsman and a scholar, but a Scotsman before he is a scholar, for his burning love of liberty makes him twist arguments to suit his case that a scholarly reason could hardly approve. Sometimes he is himself aware of it; sometimes, as in dealing with Jeremiah and the Fathers, his case simply breaks down. Strictures on Monarchy appear in Major, Boece and Buchanan, but these are largely academic. No Scotsman, with perhaps the exception of Knox, had, till the time the "Defensive Wars" was penned, been so fervent in defence of liberty or so virulently outspoken in criticism of a reigning monarch. "To me, obedience passive is a chimera, a dream, and *repugnantia in adjecto*."²

IV

When Rutherford arrived in England he found himself in the midst of the controversy centring round the doctrine of the Divine Right of Kings. Pamphleteer, poet and Prelate were all embroiled. The pens of Prynne, Milton and Rochester were all equally acid. In such a controversy the author of the "Defensive Wars" needed little instigation from Watiston or anyone else to join. His pen must have itched. The publication in 1644 of the *Sacro-sancta Regum Majestas* of John Maxwell, Bishop of Ross, was what made it scratch, more literally screech, for Maxwell was a bishop, an "apostate," a Royalist, and being these, worst of all a Scotsman. Maxwell's work is a vindictive reiteration of all the monarchist tenets and a pungent attack on the Covenanters. It is a catalogue of the arguments of all the writers on Divine Right, showing a

¹ *Lex Rex*, 158.

² *Lex Rex*, 155.

certain ability of thought as well as of vituperation. It may have been felt that a Scotsman was needed to answer a Scotsman, and Wariston "yoked" Rutherford to the work, if indeed he needed any yoking.

There is no reasonable ground for supposing that Wariston actually finished the work. It is all in Rutherford's style and an obvious answer to Maxwell in which his first work on "Defensive Wars" is embedded *in toto* with little effort to link it up with what comes before or after. Chapter 43 has a multitude of references to Scottish acts of Parliament. These are all from Sir John Skene's *Acts of Parliament* published in 1597. Wariston would have this with him in London bound up with subsequent printed Acts of Parliament (from which there are also citations). Some of the quoted Acts, mostly of James V, and the minority of James VI, give sound authority for the limitation of the royal prerogative; others would take a very strained interpretation to support any such meaning. Wariston was not above a very far-fetched interpretation of the law when it suited his ends, but Rutherford's scholastic training allowed him to turn the most seeming inconsistency to suit his case. Whether the interpretation of the Acts is Rutherford's or Wariston's is not evident. One may choose between a Jesuitical lawyer and a hair-splitting Divine. The close connection between the two is apparent. It is likeliest that Skene's *Acts of Parliament* was Wariston's possession. With the actual writing he had little to do.

Lex Rex may have been an instrument of policy as well as of propaganda. It was penned and published at the time of the negotiations between Charles and the Parliament at Oxford and Uxbridge in 1644 and 1645, which clearly showed the influence of the Scottish Presbyterians. The Proposals demanded a reformation of religion according to the Covenant, a prescription of the King's supporters, the nomination by Parliament to all places of importance in army and navy. These were largely drawn up by Wariston, who obtained the consent of the Scottish Parliament to them, and when finally presented to Charles in 1645 (January) at Uxbridge, were rendered more severe by demanding the King's taking of the Covenant and assent to the new Directory of Public Worship. *Lex Rex* is a justification in political theory of all these demands and impositions.

When the final demands were made on Charles, Wariston was in Scotland attending the Parliament and Assembly of January, 1645. Left behind to negotiate for the Scots were Lauderdale, Loudon and Henderson. Argyll and Wariston may have suspected the *politique* in Lauderdale and the temporiser in Loudon and been determined to let Charles know the real political temper of the Scottish nation or of the Covenanting party in it. Charles is reputed to have read *Lex Rex*. If he did, it is not to be marvelled at that he broke off negotiations with

the party who sponsored it. Were these negotiations ever meant to succeed? The Scots might have supported Charles if he had abandoned Episcopacy, but "Cromwell in allowing and even aiding them to influence the character of the terms was well aware that their ecclesiastical policy put an insuperable bar in the way of peace."¹ Now the King was made aware of a greater bar. If *Lex Rex* voiced the feelings of the Scottish people all his princely prerogatives and privileges were to be utterly denied and dissolved. Did Argyll, who now largely controlled the destinies of the Scottish State, wish, any more than Cromwell, that the negotiations should succeed? He was loath to relinquish the power he had obtained, and a Scotland which supported Charles would be one ruled by a Hamilton or a Montrose. Was *Lex Rex* published to show that temporising or even yielding on the ecclesiastical question alone was an insufficient condition of Scottish support? The time of a peace negotiation was hardly the time to publish an anti-monarchist treatise.

The close connection between Argyll's policy and the "Defensive Wars" has been seen. He sponsored a democratic policy for ends as yet unfathomed. Rutherford was a democrat sincerely and from no personal end. The date of Montrose's letter on "Sovereign Power" is uncertain, but the apostrophe at the end is significant.

"And you great men—if any such be among you so blinded with ambition—who aim so high as the Crown—And thou, seditious preacher, who studies to put the sovereignty in the people's hands for thy own ambitious ends—as being able, by thy wicked eloquence and hypocrisy, to infuse into them what thou pleasest—know this, that this people is more incapable of sovereignty than any other known. Thou art abused like a pedant by the nimble witted nobleman."²

Rutherford was of all the Scottish clergy the most notorious for reputedly anti-monarchist tenets. Montrose certainly had him in view in this passage, and it is quite conceivable that he had at least heard of the original treatise mentioned by Row. He believed that the Clergy were preaching democracy for their own ends and that Argyll was behind it. One wonders if Argyll subsidised the publication of *Lex Rex* or was the cause of so many copies being in the hands of the ministers at the General Assembly of 1645. Guthrie writes that every member of the Assembly "had in his hand that book lately published by Mr. Samuel Rutherford which was so idolised that whereas Buchanan's Treatise was looked upon as an oracle, this coming forth, it was slighted as not anti-

¹ Cambridge, *Mod. Hist.*, Vol. IV, 327.

² Buchan, *Montrose*.

monarchical enough and Rutherford's *Lex Rex* only thought authentic."¹ The sincerity of the reformer has unfortunately been often made to serve the ends of the politician. The publication of *Lex Rex* may have been an influencing factor, if a minor one, in Charles' decision to break off the negotiations and follow the path which led him to the scaffold.

The treatise was reissued in 1648 under a different title, *The Pre-eminence of the Election of Kings*. The sheets are the same as the edition of 1644; only the title is changed. This reissue was during the negotiations with Charles at the time of the Engagement. The intention may have been to make clear to Charles the conditions on which he could have the undivided support of the Scottish nation. It was again reissued in 1657 as a *Treatise of Civil Polity*. This time Cromwell, not Charles, was the arbitrary tyrant. The "Humble Petition and Advice" of 1657 embodied a new scheme of government. The *Treatise of Civil Polity* was put forth in relation to it to show that the same political maxims held good for Protector and Monarch alike.

The literary cause of *Lex Rex* was the *Sacro-sancta Regum Majestas*. Along with Wedderburn, Maxwell was the most inveterate Episcopalian in the Bishops' party. In 1631 he had preached a sermon on the *jus divinum* of Episcopacy which was repudiated even by the Bishops themselves. In the liturgical changes sponsored by Charles and Laud he was leading negotiator and in some respects instigator. Arminian as he was he had an absolutely determinist and fundamentalist doctrine of divine right as applied to Episcopacy and the Kingship. He expounded the latter in the *Sacro-sancta* in 1644 and the former in the *Burden of Issachar*, 1646. Exile gave acerbity to his pen; it may be kind to attribute an unwholesome sycophantic note to his poverty or to the fashion of the age. His first work is more or less an expansion of the doctrine of the Divine Right of Kings put forth by James VI in the *True Law of Free Moanrchies* with more intellectual sincerity and pertinence, for James was a Calvinist and could find in a fundamentalist interpretation of Scripture some solid grounds for his doctrine. *Lex Rex* was the answer to Maxwell and suffers from this fact. Whole passages are a word for word refutation, and construction and thought thus lack sometimes coherence. But deeper thinking and a fiercer faith shine everywhere despite prolixity, casuistry and scholasticism.

V

The sources of Rutherford's political doctrine will be examined *calamo currente* as they appear in his work. A word may be added here regarding his Scottish predecessors in this field. What approximated to

¹ Guthrie, *Memoirs*.

a democratic tradition did exist in scholastic and reformed thought in Scotland. Boece, Major, Lindsay, Knox, Buchanan and Rutherford manifest a clear line of continuity. The Kingship established by Bruce was "a limited monarchy based on the will of the feudal community and conditioned in the exercise by the concurrence and consent of the community."¹ This theory is implicit in the works of all these men and had indeed become almost a commonplace of scholastic political theory as developed by Aquinas, Aegidius Romanus, and later by Cusanus, Gerson, William of Occam and Marsiglio of Padua. In Boece, this theory is imposed on the fanciful history of prehistoric Scotland. Parliamentary speeches are inserted verbatim, and fictitious instances of the deposition and Parliamentary control of the Monarchy abound. The Celtic Monarchy, however, was elective. Major is a liberal historian in a truer sense of the word. "The staunch champion of Mediaeval constitutionalism" Mackinnon calls him. Dicta illustrating this occur everywhere in his work. "It pertains to the Three Estates in any matter of extreme difficulty to deal with doubtful matters affecting the Kingdom and on occasion for good and sufficient reason to depart from the common law."² The Three Estates alone have power of emergency taxation. "The power of the King depends on the whole people and they may depose him for worthlessness and elect another."³ His distrust of the populace is still mediaeval and aristocratic. "It is from the people, and most of all from the chief men and nobility who act for the common people, that Kings have their institution."⁴ This is feudal constitutionalism, and in fact the Estates, when not the register of the will of a strong King like James I or IV, was often the tool of a noble faction. Yet Major writes: "There is absolutely no true nobility, but virtue and the evidence of virtue, that which is commonly called nobility is naught but a windy thing of human devising."⁵ All this was capable of further development, as developed it was by his pupils, Knox and Buchanan.

The "satiric rage" of Sir David Lyndsay is a thing apart in a sense from political theory, but his hatred of injustice, his sympathy with the poor and his unsparing castigation of social evil make him the most truly democratic of all, neither Knox nor Rutherford excepted. John the Common-Weal may feel his satire, but he has his entire sympathy.

Knox and Buchanan were pupils of Major. The same political bias appears in their histories as in his, but it was Buchanan who first

¹ Mackinnon, *Constitutional Hist. of Scotland*, 190.

² John Major, *Hist. of Greater Britain*, S.H.S., 243.

³ John Major, *Hist. of Greater Britain*, S.H.S., 214.

⁴ John Major, *Hist. of Greater Britain*, S.H.S., 215.

⁵ John Major, *Hist. of Greater Britain*, S.H.S., 46.

elaborated it in a work of political theory, the *De Jure Regni apud Scotos*. Buchanan's theory of the origin of the State is a scholastic blend of Aristotle and Aquinas. Men have the instinct to association implanted by nature or rather by God. Self interest as a contributory cause is admitted (a more typical renaissance thought), but by itself it might rather dissolve than keep social unity. The medicinal element essential to a state's continuous existence is justice which is to be maintained by laws rather than by kings. The king is the servant of the law whose creator is the people acting through a council of representatives chosen from all classes. The body of judges and not the king is the interpreter of the law. The duty of the latter is to set an example of virtuous living. The tyrant is characterised and castigated mercilessly and resistance and tyrannicide are both commended. Buchanan uses many of the arguments against passive resistance already noted in the "Defensive Wars." His exposition of Romans xiii is identical with Rutherford's. The theory engendered by Cusanus and Marsiglio that the relation between the king and the people is of the nature of a contract is established. The people grant the hereditary exercise of power only on the condition that justice is done and the law administered. If the king breaks this condition, the people may depose him. But here Buchanan stops. Who exactly are to depose the King? Who shall judge him? What must be done if many subjects aid him in a bad cause? These are all left unanswered—and these were realities Rutherford had to face. Buchanan himself admits that much of which he writes is speculation. The *De Jure* is a Ciceronian essay in good, if pedantic, Latin, but while the hand is that of the Renaissance scholar, the voice is that of a mediaeval schoolman. There is no thought or mention of the individual rights of the people. Nevertheless, by his sturdy assertion of the democratic principle in Government, even if he fails to show how it could be made a working principle, Buchanan is the political ancestor of Rutherford. He dedicated his work to James VI, "not only as a monitor, but also as an importunate and even impudent dun—that it may guide you beyond the rocks of flattery and not only give you advice, but also keep you in the road you are so happily entered, and in case of any deviation, replace you in the line of your duty."¹ But his pupil answered with *The True Law of Free Monarchies* whose child was the "Sacro-sancta." The issue of the *De Jure Regni* was the *Lex Rex*, but between them intervene Suarez, Vasquez, Hooker, Bodin, Grotius, and a host of Reformation and Renaissance political thinkers.

¹ *Dedication to De Jure*, 1843 Edition.

VI

Lex and *Rex* are for Rutherford the servant of the State, even as the State was the servant of the people. To understand all his political theses it is important to know what he conceives to be the origin and more especially the end of the State.

He begins his work by discussing the origin of the State. Like Aristotle, Aquinas, and his more immediate predecessor, the Spanish Jesuit Suarez, Rutherford finds the origin of human society and the State in the social instinct of man implanted in his heart by God. Man, as Aquinas says, is "animal sociale et politicum." Other factors contribute to the founding of the State such as the uniting of families for mutual defence, and he follows the historic approach of Bodin in seeing in the family a primitive sort of State, and in their uniting for causes of material well-being the beginning of its formation. Unlike Bodin, however, he draws democratic, not autocratic, conclusions from the family theory. In this primitive society men are born free and equal nor, as he is to show later, despite altering forms of political government, do they ever lose this innate freedom and equality.

Unfortunately, they are also born sinful. Rutherford, the Calvinist, had no illusions about man in a state of nature. To check evil and preserve peace in the constituted society, Government is necessary, and God must have put the power of accomplishing this end in man's nature. The natural man may not readily submit to government, may even rebel against it, but there is a moral part in him which desires it. Calvin had stated that in his fallen state man had still a residue of intelligence and judgment left; short of achieving salvation, he conceded a good deal of scope to the human reason. Rutherford holds that this reasoning part in man is that which both submits to and begets forms of government. Government *per se* he believes to be from God Himself; forms of Government are from the people, a product of human reason and of the *jus gentium*. These two concepts, natural law (*lex naturalis*) and the law of nations (*jus gentium*) occur again and again in the *Lex Rex*, and as they are conceived as playing a supremely important part in the origin and formation of the State, they must be examined.

Greek philosophy conceived of law as the impersonal conclusion of human reason. Late Roman jurisprudence tended more and more to make it an expression of will. Aquinas sought to combine the rational and the volitional in his concept of law. The idea of God made him stress the volitional, rather than the rational, and *lex naturalis* is conceived of as part of the eternal law of God, a direct emanation of Divine will. From this natural law, all human law develops, and is only law in so far as it coheres with it. On the whole, Schoolmen and early Reformers

adopt his standpoint. But the Renaissance lawyer saw differently and again law is viewed as a product of reason. The Schoolman held that the *jus gentium*, the common ideas of right in all nations, was part of the *lex naturalis*. To Grotius, and men of his stamp, the gradual growth of common rights which was the *jus gentium* by trial and error produced and built up the *jus naturalis*. Thus a rational and empirical explanation was given to the *lex naturalis* which Schoolman and Reformer believed to be the product of Divine volition. The influence of Aquinas was strong in the Church, Roman Catholic and Protestant alike, and the theologian was now faced with a position he would not surrender, but with arguments he could hardly refute. Suarez and the Spanish Jesuits developed a theory by which they made *lex naturalis* the product of Divine volition and the *jus gentium* the product of human reason. This was a position with which Calvinist theology found no disagreement, and it was adopted by many of the Reformers, Rutherford among them. His philosophical legal theory is pure Suarez.

Natural law as being part of the eternal law of God is the highest form of law, and even the *jus gentium*, authoritative as it may be, is valid only in so far as it is in concordance with natural law. It is sometimes difficult to find what Rutherford includes in natural law for he gives no clear definition of it, and announces it merely as a great principle whose authority and working all will understand and obey. The right of self-defence, the power of Government, the movement of heavenly bodies, the Decalogue as embodying *salus populi suprema lex* are all part of the law of nature. Thus *lex naturalis* sometimes approaches to a working principal of life, sometimes to a politico-ethical concept, sometimes, as when he is forced to admit the subordination of the weak to the strong and the foolish to the wise, it appears as an axiomatic physical condition. The unifying factor is that these are all emanations of the Divine will in the physical and ethical sphere of human activity.

From this it will be seen that his construction of natural law is a somewhat selective affair. Natural law is inviolate. To establish a course of action as justified by it is final. Many things are therefore blatantly placed in this category that they may be so established. He allows a graded validity within the sphere of natural law. For instance, the axiomatic principle that the weak is subject to the strong is of less value than the law of self preservation. "Nature's law in extremity for self preservation hath rather a prerogative royal above all laws of nations and all civil laws."¹ Calvin had said very little concerning the rights and claims of individual men, perhaps because, theologically, for him they had none. Rutherford lifts the preservation of the life and

¹ *Lex Rex*, 67.

liberty, not only of the people, but of the individual into the supreme place in the law of nature.

Owing to the discursive and apologetic nature of his work, the difference between *lex naturalis* and *jus gentium* is not always manifest. He holds Suarez' view of what the *jus gentium* is, a body of law and practice emerging from the national life of the peoples whose authenticity is tested by its consonance with natural law. It is of great, though secondary importance. For instance, Government by kings is in the *jus gentium* class and so mutable. The royalists sought to make it a *lex naturalis*. Finally the specific civil laws or the common law of a kingdom come in to the old scholastic category of *jus positivum* or *civile*, and were at the will of Parliaments and people to change. This threefold conception of law is embodied in the working of the civilised state. *Lex naturalis* is immutable and inviolable. One comes to see that natural law means for Rutherford the Divine right of the preservation of the individual. A *jus gentium* may be mutable, but only after grave consideration and if proved discordant with natural law. Positive laws may be changed by those who made them. The whole rights of King and people are brought to the touchstone of these legal conceptions. As a tribute to this theology, he does state that God is working in all these forms of law, willing all through men, formulation and change alike. As a predestinarian he had to do so, but it is the external imposition of the theologian on the political philosopher.

The idea of the end of the state is best summed up in the author's own words requiring that "all law, policy, magistrates and power be referred to the people's good as the end and to their quiet and peaceable life in godliness and honesty."¹ In this same passage he emphatically refutes the doctrine that the state (here as embodied in the King) is an end in itself; a doctrine already stated by Machiavelli to be the best formulated by Hobbes and to be most practised by the totalitarian states of the twentieth century. Aristotle, Aquinas and Suarez alike saw the end of the state as being to make men good—though virtue had perhaps a different ethical content for Aristotle than for the Christian theologian. St. Thomas believed that this goodness was best achieved in "the unity that is called peace." In *Lex Rex* the end of the Christian State is surely nobly set forth as "the people's good in a quiet and peaceable life of godliness and honesty." Riches and power are dismissed as of minor importance. All these conceptions of the origin, cohesive principles and end of a state determine his attitude to the form of Government pertaining in it and especially to the theory of monarchy put forward by James VI King of Scots, for Maxwell is an echo of that monarch.

¹ *Lex Rex*, 119.

In 1598 (the year of the *True Law*) James had established his power in Scotland by the application of his shrewd native intelligence. The Scottish Parliament had done little hitherto to win either the respect of King or people, but a Scottish Parliament allied to a Presbyterian ministry might become a decided nuisance to the Monarch. He saw in England the close connection between civil and religious agitation. Scotland might catch the infection. James was a Calvinist and a Predestinarian. The age accepted Scripture proofs and predestinarian principle as ultimate criteria of truth, so James sought to establish absolute monarchy on grounds which the Presbyterians themselves regarded as valid and thus to destroy them with their own weapons of warfare. When one wonders at fundamentalist and predestinarian views of monarchy flowing from the pen of Arminian clergy, it may be remembered that they got them from a Calvinist King.

VII

One may first of all examine the Divine institution of Monarchic government claimed by James and Maxwell and then notice Rutherford's refutation and counter-theory. First come the Scripture arguments. Kings in Holy Writ are directly appointed by God. "By Me Kings reign" (Proverbs viii. 15); "Ye are God's" (Psalm lxxxii. 6); "The powers that be are ordained of God" (Rom. xiii.); "This is the law of the King who shall reign over you" (I Sam. viii. 2)—(where *Mishpat* is translated "law" and not "manner" as in the A.V.)—are all adduced as proofs. The anointing of Saul and David is used as a symbol and type of God's immediate creation of the monarch, even the Kingship of Nebuchadnezzar over the Jews is pressed into service to illustrate the divine right of absolute Kingship. This too is inherent in the law of nature, the chief argument being that the King's power in the state is identical with the father's in the family. His right also may be based on conquest. The subjection of the weak to the strong is a natural law, and a King who retains his conquests (as James's predecessor had presumably done) has obviously God's approving will behind him. Men are born Kings because as in the case of David's line God ties the Kingship to a family. This was more than the Divine right of Kings; it was the Divine right of the Stuarts. When Maxwell added to this that the sovereign partook of a ray of divine majesty, he seemed to present a semi-deification of that race. Finally he says, "God makes Kings by a special and eminent act of Providence."

Rutherford admitted a divine origin for monarchy, but denied that it conveyed any right to absolute rule. He disposes of his adversaries'

Scriptural arguments more or less satisfactorily. For instance, regarding "by Me Kings reign," he points out that all men, not Kings alone, perform their actions by the grace of God. The other "proofs" may show the divine origin of Kingship and the divine control of Kingship, but confer no absolute right. He has as little difficulty in proving the Jewish Monarchy to be elective as his opponents in proving it a divine autocracy. Here, in dealing with Scripture incident, he shows the same freedom as in the "Defensive Wars." "The anointing of Saul cannot be a leading rule to the making of Kings to the world's end."¹ In Deut. xvii he himself found sound Scriptural ground for the limiting of royal power by law and election.

The claim to Divine right through natural law is denied because he refuses to put fatherly power in the family and Kingly power in the state in the same category. The first is by natural law, but the second is mediated by *jus gentium*. On Divine right, established through conquest, upheld by God's approval, he is more reserved, for he has to face a historic fact in Scripture and else where. He falls back on the hidden will of God. Conquest, especially just conquest—"a stronger king, for pregnant national reasons, may lawfully subdue and reign over an innocent posterity"²—may give some title to the crown. But no conqueror can claim that he is an instrument of Providence, that he may be is known only in the hidden will of God, and indeed he is to be resisted for man can only act on the revealed will of God which by natural law ordains that they resist tyranny in the interest of self-preservation. "Bloody conquerors have no extraordinary revelation from Heaven"³—how often has history seen them claim it! If conquest there must be, the victor must impose no undue hardships or violent conditions. Title by conquest is of human and not Divine origin.

If title by conquest is valid, title by birth cannot be, and vice versa, for if an alien prince conquers a hereditary king, you have two anomalous claims based on a presumably Divine natural law. "There is no Divine Covenant tying the crown to a race as in the time of David."⁴ The "ray of Divine majesty" is met chiefly by ridicule.

Rutherford's criticism is not all negative for he announces his own clear convictions of the origin and rights of Kingship and they are high ones. No less than the royalist he believes kings are of God. Since government is by Divine institution, kings are of Divine institution as indeed autocracy or democracy are of Divine institution, but established by *jus gentium* not *lex naturalis*. These forms are mediated through the will of a people who choose who shall rule. The institution of the office

¹ *Lex Rex*, 191.

² *Lex Rex*, 48.

³ *Lex Rex*, 48.

⁴ *Lex Rex*, 48.

is by God ; the application of the man to the office is by the people. He labours to avoid the charge of Jesuit doctrine as in Bellarmine and Suarez that Kings are a human institution having only God's " naked approbation " and brings his Calvinism to the rescue. Over all is the Providence of God, but " Providence worketh by means." God certainly predestines the office and the man to the office, but he determines the wills of the people that by their free suffrages they choose such and such a man for it. It is thus plain that in human relationships and concerns the will of the people is a cardinal factor, limiting any absolute right of the King, for if Divine origin confers Divine right, they have as much nay more of it. His is the Jesuit theory of Bellarmine, Suarez and Vasquez Calvinised by a Scotch Presbyterian. On one side is the voluntary will of the people ; on the other is the " supervenient institution of God."

With regard to the actual instrument of election, Rutherford places it in the hands of the Three Estates to avoid the charge of giving power to the unruly hydra-headed populace, but as will be seen, he would place far more power in the democratic than in the aristocratic component of the Estates. " What other calling of God hath a race, family or a person to the crown but only the election of the Estates?"¹ He has no predilection for hereditary succession or against it, provided it is recognised that the Estates settle it. Conditions determine the case. " In a kingdom to be constituted, election is better ; in a constituted kingdom, birth seemeth less evil. In respect of liberty, election is most convenient ; in respect of peace and safety, birth is safer and the nearest way to the well."² Rutherford's principles are the same as those which inspired the Whig formulators of the Revolution Settlement and its implicit, if not explicit doctrine of an elective crown. In this, and in other ways, such as insistence on the freedom of judges from the power of the crown, he points directly to Locke.

VIII

The limitation of the absolute power of the monarch was a natural corollary to the qualified theory of divine origin put forward in the *Lex Rex*. This limited power was implicit in the contract relation between the sovereign and the people who elected him. This contract theory holds supreme place in the political thought of the late 16th and the 17th centuries. It had its origin in the doctrines of Cusanus and Marsiglio that all human law had its validity in the consent of the people, hence also the authority and power of the King conceived as legislator depended on that consent. " All politic society is based on the consent

¹ *Lex Rex*, 8.

² *Lex Rex*, 46.

of men " writes Rutherford. The monarchomachs of France and Holland further developed the theory that the people in electing a King, hereditary or otherwise, gave to him a certain power only on condition that he ruled in their interest in things civil and religious. When he ceased to do so, the contract lapsed and the people could resume the power. James VI saw the danger of such a theory and set his own Calvinistic doctrine against it, but other royalists sought to use the theory itself. Hooker and Maxwell maintain that the people made a supreme and final rendition of power into the sovereign's hands. They cannot reassume it. Even Suarez, whom Rutherford follows closely, is inclined to make the rendition almost final.

It is the doctrine of the monarchomachs, especially that of the *Vindiciae contra tyrannos* that Rutherford adopts. To the idea of contract between king and people for the peaceable government of the latter, federal theology added that of a covenant before God. Duplessis-Mornay (or whoever wrote it) elaborated this in the *Vindiciae*. There were in reality two contracts: that with the king and people co-contractors to maintain the worship of God, and that between king and people, where the king pledged himself to rule justly and the people to obey him. The great text, of course, which Rutherford takes almost a chapter to expound, is " Jehoida made a covenant between the Lord and the King and the people that they should be the Lord's people, between the king also and the people " (II Kings xvii). This theory of contract remained purely governmental in the hands of the late 16th and early 17th century *politiques*. Dunning shows that though it supposedly placed the power in the hands of the people, by conceiving of the governing class as their representatives, it was often decidedly reactionary.¹ The governmental contract merged into the social contract, developed so differently by Hobbes and Locke. Hobbes maintained that each man agreed with his fellow to give up all right of governing himself to another provided his fellow did the same. The surrender was final. Locke maintained that the only right given up was that of the individual to punish by natural right offences against himself or the community.

Rutherford in many ways comes very near to Locke. The theologian in him could not resist the covenant idea, but it may be said that the coronation oath of a Christian King is a Covenant. It was because Charles broke this oath and Covenant that he was to be resisted, since it is a valid legal principle that when a contract is broken by one party, the other is released from its ties. The idea of a contract in the *Lex Rex* goes far beyond thinking of the people as a vague body represented through a governing class. Rutherford opposed the veto of an Upper

¹ Dunning, *History of Political Theories*, Vo. II, 77.

House in legislation (going far beyond Locke in this), and maintains the right of the people to depose members of Parliament. He is concerned with the rights of the individual in the community. After all the danger of having one's throat cut by an Irishman was an individual problem. The signing of the numerous Petitions which preceded it and of the National Covenant itself is an attempt, if a somewhat formal one, to announce the rights of the individual in the ordering of the State. The English Common lawyer talked of the rights of Englishmen, but would have been satisfied with the rights of his class. Justice, said Rutherford, should be as cheap to the poor as a draught of water. He was concerned with the rights of men. The weak spot in his argument is that he does not make clear how the people are to enforce their consenting power on a recalcitrant king or Parliament, if it is disregarded. What sanction they are to apply is never made clear, and it would appear in some cases that armed rebellion is the only remedy. From dicta here and there one gathers that the sanction is abolition of an Upper House and control of the county and burgess representatives by those who elect them. He avoids too flagrant a criticism of the aristocracy for his party depended on their favour. His doctrine is best summed up in his own words, "All politic power is based on the consent of man." The King's power is "but a birth right of the people, borrowed from them, they may let it out for their good, and resume it when a man is drunk with it."¹ He was a man of the people, who felt as they felt, hoped as they hoped, sorrowed as they sorrowed. It was impossible for him to understand the people as a vague aggregate or a theoretical repository of power.

The King's power, therefore, is not absolute but fiduciary, limited by natural law, by the law of nations and by the positive laws of the State. All these latter are referred to the end of the State already mentioned—namely, the people's good in a quiet and peaceful life of godliness and honesty. From this it follows that *salus populi suprema lex*, that the safety and welfare of the people must be the intent and purpose of all civil law. Thus the content of the law itself and not the authority of the lawgiver is what gives validity. "No law is good because the will of a King makes it so."² Like Buchanan, he asserts that all law must have the authoritative influence of the people behind its promulgation, but whereas the former seems to think the actual promulgation and tacit consent of the people sufficient, Rutherford stresses the content of the law in concurrence with the consent of the people. Laws, therefore, "ought not to be made so obscure as an ordinary wit cannot see their connection with fundamental truths of policy."³ Not only should law be intelligible, but

¹ *Lex Rex*, 123.

² *Lex Rex*, 138.

³ *Lex Rex*, 137.

justice should be cheap. As passionately as Lindsay satirised the absence, so passionately he demands the existence of these two things—simpler law and surer justice. Many of his legal citations on the limiting of kingly power are from Acts some times (as Parl. II, James I, 45) motivated by a strong king himself demanding justice for the poor man and providing him with an advocate. The sophistry of the English Common lawyer would often have “scunnered” Rutherford. Because of the demands of a true justice, he opposes all acts of prerogative in the king. The only allowance of prerogative to a King is the power to dispense with the letter of the law in a case where such a law may have been broken by a citizen to accomplish an act of security for State or people. Pardon of culpable offenders is ruled out as a dangerous principle. Other rights, such as coinage and the raising of an army in an emergency, he concedes in so far as they tend to the civil security. Reminiscent of Melville are the words, “Better the King weep for the childish trifle of a prerogative than Popery be erected and three Kingdoms be destroyed.”¹

Rutherford insists time and time again on the freeing of the judges from the power of the King. He himself had suffered from a judicatory controlled by the sovereign. The judges, he maintains, do not owe their authority to the King, but, like him, derived it from the people for whom they judge. He cites laws of Scotland whereby the King is prohibited from interfering in acts of judgment and any letter of interference made null and void. (Act 47, Parl. II, James VI, 1581: “a minority” Act.) He demands the abolition of the hereditary jurisdictions and sheriffdoms, some of which existed in Scotland to an even later date. The interpretation of the law is to be in the hands of the judges—“No King can alter a just law, not even Omnipotence.”² In seeking to free the juridical faculty from the appointment and control of the King, Rutherford is at one with the Revolution Whig. His advice to the judge was the text of Leviticus, “Thou shalt not respect the person of the poor, nor honour the person of the mighty, but in righteousness shalt thou judge” (Lev. xix. 15).³

IX

When the writer of the introduction to the 1843 edition of *Lex Rex* remarks that some of its ideas may be thought too democratical for modern times, he perhaps had the Parliamentary ideas of *Lex Rex* in view. Rutherford visualises a much more democratic institution than existed in his day. A Convention of three estates with an equal right in all affairs of State is the ideal. This body should be elective. He does not see why

¹ *Lex Rex*, 125.

² *Lex Rex*, 138.

³ *Lex Rex*, 131.

an Upper House should exercise a veto or why nobles should have special privileges. "I see not what privileges nobles have above commons in a court of parliament by God's law, but as they are judges, all are equally judges, and all make up one congregation of God's."¹ "That our nobles are born lords of parliament, and judges by blood, is a positive law,"² i.e., a law which may be changed. He just shrinks from saying must be changed. In Letter CCCIX, at this time, he writes, "The House of Peers are rotten men." The convention he visualises has power to choose its officials and executives who are responsible to it. The King may convene Parliament as its highest administrative officer, but Parliament possesses this right in itself. No Parliamentary Acts are irrevocable, but may be amended and repealed by subsequent Parliaments. To Parliament the King is absolutely responsible; to the people, the Parliament. The weakness here is that he does not quite separate the legislative from the executive and judicial functions. It must be remembered that many of these existed side by side in the Scottish Parliament and that the Court of Session was only a hundred years old.

The cry, outcry, or war-cry of the English Parliamentarian was Life, Liberty and Property. Life and Liberty were as dear to Rutherford as to them. Resistance when these were in danger was a Divine duty. Property was not so sacred. It has been seen that he refused to counsel armed resistance to unjust taxation. If the English Common lawyer had succeeded in establishing the inviolable right of property, especially for his class, he would have been content to surrender a good deal of his religious liberty. It was otherwise with the Scot. He admits a certain state control of property. In a state of emergency a man may be obliged "to give all he hath for the good of the Commonwealth and so for the good of the King in as far as he is head and father of the Commonwealth."³ The sanctity of private property is vindicated strongly enough. In a way, Royalist was as keen in this matter as Parliamentarian, and even Bodin finds the absoluteness of a King limited by it. In *Lex Rex* private ownership seems to be half way between the law of nature and a law of nations, and only to be entrenched upon in a state of grave emergency. The King had no absolute mastery over the private property of his subjects. His power is fiduciary. He rules to preserve their interest in that property. They may from it pay just taxes, but not his bad debts (i.e., expenses incurred without consent of Parliament or money put to a bad use). "I dare not pray all our King's debts be paid; I have scarce faith so to do."⁴ Nevertheless, charitative subsidies may lawfully be paid to Charles though their imposition is little better than princely begging.

¹ *Lex Rex*, 34.

² *Lex Rex*, 94.

³ *Lex Rex*, 67.

⁴ *Lex Rex*, 233.

In monetary and fiscal affairs, Rutherford only sought reform through legislation and passive resistance, not by arms. In putting life and liberty before property he was nobler minded than many of the politicians of his own time or since.

It is not proposed here to deal with the relations of King and Church ; there is little concerning them in *Lex Rex*. The author believed that the King should establish the true religion, i.e., reformed Presbyterianism, maintain its ministry, and even help it to enforce discipline, but in the determination of doctrine, worship and discipline he had no final prerogative, nor had Parliament, or even for that matter, the people. He deals with Erastianism more copiously in other works.

In Rutherford's eyes, absolute monarchy is indeed a chimera and, if the monster does take concrete shape, it is to be dealt with as monsters are, and is to be destroyed. Like monarchomach and Jesuit, he holds that a private man may kill a tyrant and, justifying this, says that tyranny is never obscure long. One tyrannous act does not make a King a tyrant, but the King is to be resisted in such acts and, if he persists in them, is to be deposed by Parliament and people. Rutherford's partiality is for a limited monarchy. Yet different nations may have different forms of government which are all equally sound, for neither fewness nor greatness of numbers make a government good, only its effectiveness in procuring the safety and well-being of a people. The discussion as to whether monarchy, aristocracy or democracy, or one of the many blends of all is best he finds a "dark way."¹ "To me it is probable that the monarchy *de jure*, that is, lawful and limited monarchy, is best even now, in a kingdom, under the fall of sin, if other circumstances be considered." He found in it a wise combination of the monarchic, aristocratic and democratic principles.² In one passage, with some humour, he cites the things which limit a king—he may not marry whom he pleaseth, he may not eat what meats he pleaseth, nor is it in his power to be buried where he pleaseth. The King's duty is to guide the State and set an example of gracious morals. He is the most eminent servant of the State.

X

These are the doctrines of *Lex Rex*. They are not systematically developed, but they are there. His thought suffers from the literary mechanism which proceeds by assertion and refutation, refutation and counter-assertion, by question and answer, by syllogism and *reductio ad absurdum*. He is not entirely an original thinker ; much of what he says has been said before, perhaps better, but not more fearlessly nor more

¹ *Lex Rex*, 190.

² *Lex Rex*, 192.

sincerely. His doctrine of resistance, his theory of contract and consent, his justification of tyrannicide had all their place in scholastic teaching. But by Rutherford's time these have become practical issues and are accordingly all the more passionately stated. He is more sincerely concerned for the welfare of the people than English Puritan or Revolution Whig. His vision is truer than the former's in seeing that extraordinary taxation may be a dire necessity and is not to be resisted merely because it is heavy, and his democracy is greater than the latter's for he had small use for a House of Lords. His doctrine of an elective crown, of a limited monarchy, and of a judicatory freed from royal control are those of the Revolution. His faults lie not so much in his doctrines as in the way he seeks to prove them especially in a too mechanical use of *lex naturalis* and *jus gentium* and of scholastic methods of argument. There is little in his pages, with the exception of justified tyrannicide that has not become embodied in the modern constitution. If the roots of *Lex Rex* are in the somewhat arid field of late Mediaeval Scholasticism, the branches reach out to the Revolution, even to the years of Chartist Reform and the practical fruits of its doctrine are still enjoyed by men.

Rutherford may be the child of late Mediaeval thought, of Major of Knox and of Buchanan, but he immeasurably further advanced in the democratic ideal. This is due to three things. First, the doctrines in question had become practical issues. Second, Calvinism which democratised the clergy had ultimately the same effect on the lay professors of that creed ; though Calvin may have counselled non-resistance to princes, the countries which adopted his peculiar blend of theology became stoutest in resistance to them and most democratic in their constitutions. The last factor was the immense amount of political thinking done between the time of Buchanan and Rutherford. Rutherford's sources are enormous. Aristotle and Ulpian, Aquinas and Aegidius Romanus, Gerson, Marsiglio and Cusanus, Hotman, Althusius, and Grotius, Suarez, Vasquez and Bellarmine, Bodin, Barclay and Ferne, James VI and Maxwell—Greek Philosopher, Roman jurist, Mediaeval Schoolman, Conciliar advocate, Spanish Jesuit, Dutch jurist, English pamphleteer, French royalist are all made to contribute to the argument, or refuted in their doctrine. There is little reference to the Reformed theologian. As their witness differed from his, Rutherford, as he could not abuse, "miskens" it, as Mr. Baillie would say. His doctrine of tyrannicide is more Bellarmine than Beza ; his doctrine of contract more Duplessis-Mornay than Calvin, but his love of the people is more Rutherford than anybody else. All the colossal learning shown bears evidence of first hand study of the works in question.

The style of the work is very unequal. Much of it is dull, dreary and scholastic, even pedantic, but suddenly in the midst of the dullest passage

an amazing epigram which puts the whole case in a nutshell blazes out, "Conquest without consent is but royal robbery."¹ "Power to do ill, without resistance, is not security."² "Justice should be at as easy a rate to the poor as a draught of water."³ One wishes that he had indulged in the apothegm more often. His illustrations are often homely and not without a dry Scotch humour. When he comes to speak of freedom, of the threat to Scotland, of the tyranny of the King, his pen blazes. He startled his contemporaries, and perhaps not so much by his doctrine as by his personal attack on Charles. He shows a vivid power of biting irony, dry sarcasm and open savage scorn all at Charles's expense. He startles by his fearlessness. He compares Charles to a furious Nero; he suggests he is a bloody monster; he subtly mocks the Stuart fondness for talking about "Our Royal wisdom." "There be more foolish kings in the world than wise, and kings misled by idolatrous queens—Ahab ruined himself and his posterity and his kingdom."⁴ Charles is compared to Nero and Ahab, and called "this man Charles"; his wife is stigmatised as Jezebel. The son had *Lex Rex* burned by the hangman, and the author was designed for the same hands only escaping by death.

His doctrines were never put into practice in Scotland, for the Scottish Parliament hardly survived his death fifty years. Nor in Rutherford's own time did they find acceptance. Cromwell came to power five years after the publication of *Lex Rex*. Wariston, who "yoked" him to the task, became a servant of the Protector, forswearing by that act the principles he had sponsored. Argyll when in power was as factious as any other noble. Rutherford in his old age drew away from these two men whom he had loved much because, amongst other things, they had drawn away from the ideals they had encouraged him to set out in *Lex Rex*. He was before his time. Scotland was not ready for the changes his doctrine would have brought. The fiasco of the "drunken Parliament" followed his death. Many of his contemporaries, even of his friends, thought of him only as an unruly extremist. They did not see how great the principles underlying his monarchomachy were. If to love liberty, and to hate injustice, is to be an extremist his nation for centuries has been a nation of extremists.

¹ *Lex Rex*, 175.

² *Lex Rex*, 179.

³ *Lex Rex*, 95.

⁴ *Lex Rex*, 122.